In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1636

RICHARD FLOYD MCCOY, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 7, 1973. The petition for a writ of certiorari was filed on June 6, 1973. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an affidavit submitted to support the issuance of a search warrant was insufficient because it consisted of an FBI agent's compilation of reports made to him by other FBI agents conducting an investigation into the offense charged.

2. Whether the search was invalid because the warrant incorrectly stated the name of the affiant.

STATEMENT

After a jury trial in the United States District Court for the District of Utah, petitioner was convicted of aircraft piracy, in violation of 49 U.S.C. 1472(i)(1), and sentenced to imprisonment for forty-five years. The court of appeals affirmed (Pet. App. A).

The pertinent facts, summarized in the opinion of the court of appeals, show that on April 7, 1972, a United Airlines plane en route from Denver to Los Angeles was commandeered by a skyjacker who forced the pilot to alter his course and land in San Francisco. There the skyjacker allowed the passengers to deplane and received a ransom of $500,000 and several parachutes from the airline company. The pilot was then ordered to fly to Utah. The skyjacker bailed out with the money near Provo, Utah.

Two days later, petitioner, a resident of Provo, Utah, was arrested and immediately taken before a magistrate. In petitioner's presence, FBI agent William J. Geiermann submitted an affidavit to the magistrate, who then issued a warrant to search petitioner's residence. As a result of that search, $499,970 in currency and other incriminating items such as weapons, ammunition and a parachute and harness were seized from the residence.

ARGUMENT

1. The lengthy affidavit supporting the search warrant contained information collected by agent Geiermann from other FBI agents who had reported the results of their own investigations. For example, agent Geiermann stated that he had been advised by a San

Francisco agent that a passenger aboard the hijacked plane had been interviewed and had identified a photograph of petitioner as being a picture of the skyjacker. Geiermann also reported in his affidavit that he had been informed by another agent that the latter had interviewed one of the plane's stewardesses; that she had produced a note which the skyjacker had sent to the pilot during the flight; and that the writing on the note had been examined at the FBI laboratory in Washington, D.C., and found to match petitioner's handwriting on his military records. Agent Geiermann stated further that he had been advised by another FBI agent that a Utah state policeman serving in the National Guard with petitioner had said that petitioner was a sky-diver; moreover, the patrolman had talked with petitioner about a plane skyjacking and had determined that petitioner was not home on the night the offense in question had been committed. The patrolman also stated that he had been told by petitioner's sister-in-law that petitioner had asked for help in a hijack operation.

While recognizing that search warrants may properly be based on hearsay (*e.g., United States* v. *Harris,* 403 U.S. 573; *Jones* v. *United States,* 362 U.S. 257), petitioner claims that affidavits based upon "double hearsay"—*i.e.,* hearsay statements of individuals containing statements made to them—are inadequate to support a finding of probable cause. This position is not well taken. No hearsay need be automatically disqualified; rather, it can be evaluated to determine whether the informant obtained his information in a reliable way and from reliable sources. If so, the requisite amount and quality of information might well exist to justify issuance of a warrant. *United States* v. *Smith,* 462 F. 2d 456 (C.A. 8).

This case does not involve unnamed informants of questionable reputation providing anonymous hearsay upon hearsay. See *United States* v. *Roth*, 391 F. 2d 507 (C.A. 7); cf. *United States* v. *Moore*, 452 F. 2d 569 (C.A. 6), certiorari denied, 407 U.S. 910. Rather, the affidavit under attack was the product of investigations conducted in different communities by several FBI agents, who had secured their information from eyewitnesses, scientific reports, and individuals who had spoken directly with petitioner. All of these interviews and reports were collected by agent Geiermann, who justifiably relied upon them in preparing his affidavit. As the Court of Appeals for the Fifth Circuit recently held (*United States* v. *Melancon*, 462 F. 2d 82, 91, certiorari denied, 409 U.S. 1038):

> We see no reason to discredit information passed from one law enforcement official to another before being offered to a magistrate as grounds for probable cause.

2. Through an oversight, the warrant issued by the magistrate incorrectly identified as the affiant another FBI agent, Lote Kinney, Jr., who was directed to execute the warrant. The court of appeals correctly analyzed this technical error as not affecting petitioner's constitutional rights, since the Fourth Amendment does not require that the name of the affiant be identified in a search warrant. At the time the warrant was issued, however, Rule 41(c), Fed.R.Crim.P., did direct that a warrant should state the names of the affiants.[1] Nevertheless, in light of the facts (1) that

[1] Effective October 1, 1972, the provision requiring the listing of affiants in a warrant was deleted. The Advisory Committee on Rules explains (Notes of Advisory Committee on Rules, 18 U.S.C. (Supp. II), Rule 41, p. 404):

> The requirement that the warrant itself state the grounds for its issuance and the names of any affiants, is eliminated

petitioner was well aware of the identity of the affiant, since he was present when agent Geiermann submitted his affidavit, (2) that a copy of the affidavit was properly presented to petitioner's wife when the warrant was executed, and (3) that the oversight had no effect upon petitioner's ability to challenge the matter contained in the affidavit, the courts below properly denied relief to petitioner based upon this irregularity. They correctly concluded that petitioner's Fourth Amendment rights were totally unaffected by what amounted to nothing more than "technical noncompliance with a paperwork requirement." *United States* v. *Soriano,* decided July 2, 1973 (C.A. 5, No. 72-1520, slip op., p. 21).

Petitioner claims, however, that the test for applying the harmless error rule in the law of search and seizure is whether the admission in evidence of the product of an unlawful search was harmless in light of otherwise overwhelming evidence of guilt (Pet. 6). He alleges that under this test the courts below were required to determine whether the items recovered from his residence had a significant impact upon the jury's verdict. The standard urged by petitioner may well be applicable in instances where a search itself is invalidated under the Fourth Amendment. Here, however, the issue is whether the validity of the search of petitioner's residence under the Fourth Amendment was affected by the technical defect in the warrant. Where the matter complained of involves merely a procedural irregularity in observing the requirements of Rule 41, "absent a showing of prejudice, irregularities in these

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as unnecessary paper work. * * * A person who wishes to challenge the validity of a search warrant has access to the affidavits upon which the warrant was issued.

procedures do not void an otherwise valid search." *United States* v. *McKenzie*, 446 F. 2d 949, 954 (C.A. 6).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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